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No. 84-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO and METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From the Court of Appeals of Michigan

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

MILTON L. CHAPPELL
Counsel of Record
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

DAVID E. KEMPNER
Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C.
2900 Penobscot Building
Detroit, Michigan 48226
(313) 965-7610

Attorneys for Appellant

October 24, 1984

COOKE TYPOGRAPHERS, ARLINGTON, VIRGINIA 22206 — (703) 671-6830

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Pursuant to Rule 16.5 of the Rules of this Court, Appellant David E. Kempner hereby opposes Appellees' motion to dismiss this appeal.

ARGUMENT

The motion to dismiss filed by Appellee Local 2077 and its affiliate Council 25 ("the union") says little, if anything, on the merits. Instead, it attempts to confuse and obscure the important questions presented in this appeal by asserting a series of nonsequiturs and misleading irrelevancies, distorting the record, and blatantly mispresenting the law.

Two grounds are stated for the union's motion to dismiss: (1) that the appeal does not present a substantial federal question, and (2) that the rulings below rest on an adequate nonfederal basis. No support whatsoever is offered for the latter claim, and it is patently absurd since this case was decided on constitutional grounds by both the Michigan Employment Relations Commission ("MERC"), App. B at 14a,[1] and the Court of Appeals, App. A at 5a-8a. The former claim has no merit given the clear authority cited in Appellant's Jurisdictional Statement, this Court's own decision in *Ellis v. Railway Clerks,* —— U.S. ——, 104 S. Ct. 1883 (1984), as well as such key post-*Ellis* rulings as *Hudson v. Chicago Teachers Union,* —— F.2d ——, 117 L.R.R.M. 2314 (7th Cir. Sept. 6, 1984).

The *Hudson* decision is particularly important because it addresses both of the issues presented in this appeal. The Seventh Circuit first ruled that forced

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[1] Appendix ("App.") references are to the appendices to the Jurisdictional Statement.

utilization of an intra-union rebate scheme violated the plaintiffs' due process rights. 117 L.R.R.M. 2319-2320. Judge Posner began his analysis by observing:

> The most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees. . . . It is not surprising therefore that some of the plaintiffs thought it futile to even ask the union to reduce the fee.

Id. at 2319 (citations omitted).

The fact that the last step in the rebate scheme was an appeal to an arbitrator did not lessen the violations since the arbitrator was selected by the union. This point was illustrated by a most apt analogy:

> There are 15 federal district judges in active service in the Northern District of Illinois, all unimpeachably accredited; and yet the union would not try to defend a procedure that let it (or the dissenters!) pick the judge to preside in this case. . . .

Id. (citations omitted). The arbitrator's "financial interest in deciding cases favorably to the union"[2] made the situation "even more troublesome."

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[2] A recent decision of the Michigan Court of Appeals is pertinent to this point. In *Albion Public Schools v. Albion Educ. Ass'n/MEA/NEA*, 130 Mich. App. 698, 700-703, 344 N.W.2d 55, 57-58 (1983), the court affirmed a ruling that an arbitrator's services on the Michigan Education Association's rebate panel were "consultive" in nature and therefore "likely [to] create a presumption of bias in the mind of a person reviewing his qualifications as arbitrator." As in *Hudson* and the instant case, the members of the panel "were selected solely by the [union]" and their employment was "not as a pure or typical arbitrator."

This Court's decision in *McDonald v. City of West Branch,* —— U.S. ——, 104 S. Ct. 1799 (1984), provided another basis for the Seventh Circuit's holding that the union rebate scheme in *Hudson* was constitutionally inadequate.

> [*McDonald*] suggests that the Supreme Court doubts the competence of arbitrators—whose area of expertise, after all, is the interpretation of contracts rather than interpretation of the Constitution—to make First Amendment determinations. . . . But that is what the arbitrator would have to do in any case where the dissenter objected that the agency fee that he was forced to pay was being used for impermissible political and ideological purposes.

Id. at 2320 (citations omitted). Therefore, the Seventh Circuit suggested that the "constitutional minimum" in agency shop cases would be a procedure incorporating fair notice, a prompt administrative hearing before a state or local agency with the usual evidentiary safeguards, and a right to judicial review of that agency's decision. *Id.*

The second major holding in *Hudson,* 117 L.R.R.M. at 2320-21, involved the right to escrow disputed agency fees pending a governmental adjudication of the constitutionally proper amount. The procedure in *Hudson* like the one at issue called for an initial reduction of the agency shop fee by the union. Nevertheless, the Seventh Circuit agreed with the plaintiffs that this scheme was still constitutionally deficient under *Ellis,* 104 S. Ct. at 1890.

> It is true that in *Ellis* the union had made no effort to determine in advance what fraction of its dues were not pertinent to collective bargaining and therefore should not be charged to objecting non-

> members. But this is an *immaterial difference,* at least on the facts of this case. *A union cannot just choose some level of agency fee and, if it chooses too high, have the use, interest free, of the excess that it is later ordered to refund, until it refunds it.*

Hudson, 117 L.R.R.M. 2320 (emphasis added); *see also Robinson v. New Jersey,* 741 F.2d 599, 616-619 (3rd Cir. 1984) (Sloviter, dissenting).

While not raised in the union's motion to dismiss, it is appropriate to comment briefly on the recent summary dismissal of the appeal in *Jibson v. White Cloud Educ. Ass'n,* No. 83-1816, 53 U.S.L.W. 3268 (October 9, 1984). Whatever the reasons for the Court's decision that action is not binding upon the Court in this case. 12 MOORE'S FEDERAL PRACTICE, ¶ 400.05-1, pp. 4-22 through 4-25 (1982). Furthermore, since *Jibson* did not involve exhaustion of intra-union remedies, that question is still completely open. The two cases are also distinguishable for several other reasons.

First, the lower court in *Jibson* determined that escrow was unnecessary because there would be an expedited judicial determination of the correct amount of the fee. The sparse record did not show that any disputed fees would be spent by the union while those procedures were taking place. In the instant appeal, however, an administrative determination of appellant's unfair labor practice charge was denied pending total exhaustion of the union's rebate scheme. This could take many years, as evidenced by the terms of the scheme itself, App. F. at 51a-54a, as well as by the union's motion to dismiss.[3] During this time, the union

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[3] The union states that the International Union Review Panel's decision for the 1973-74 fiscal year was not issued until September 1, 1977. Motion to Dismiss at 4.

would have the unrestricted use of Ms. D'Alleva's agency fee.

Second, in *Jibson* there was also no evidence in the record to suggest that the union's unilateral fee reduction was too small. Here, the fee reduction of 6.6%[4] would still have allowed for the union to "borrow" Ms. D'Alleva's funds for improper purposes. *See* Jurisdictional Statement at 17 n.14.

The instant case is therefore clearly distinguishable from *Jibson* and presents both the exhaustion and escrow issues on a fully developed record. In fact the opportunity to review the instant case was one of the main reasons given by the appellee in *Jibson* in support of his motion to dismiss:

> [T]he *Kempner* litigation presents a far better vehicle for clarifying . . . agency shop procedures than the instant case with its sparse record and exceedingly narrow escrow issue.
>
> * * *
>
> As evidenced by the *Kempner* decision . . ., it is apparent that significant Michigan evolution of the requirements of *Abood* has occurred since 1977 . . . [C]ontinued clarification of the law of agency shop will ultimately be necessary . . .

Jibson, Motion to Dismiss at 9,11 (June 7, 1984).

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[4] It is significant that the table on which this 6.6% figure was based shows that the union has consistently underestimated its initial rebate calculations. Moreover, even under the overly restrictive standard set forth in the International Union's Constitution ("*partisan* political or ideological purposes"), the rebate for 1973-74 was eventually increased from 4.78% to 11%. Motion to Dismiss at 4.

SPECIFIC RESPONSES TO MOTION TO DISMISS

Space limitations do not permit a point-by-point rebuttal of the union's motion to dismiss. However, a few short observations are in order:

1. All references by the union to the arbitration proceedings before Mr. Roumell are irrelevant. Ms. D'Alleva was not a party to that case; the arbitrator accepted the union's unilateral fee reduction without requiring any supporting evidence or making a finding that the 6.6% reduction was proper; and the MERC Administrative Law Judge in this case expressly ruled as a matter of state law that he was precluded from deferring to the arbitration award by the Michigan Supreme Court's holding in *Detroit Fire Fighters Ass'n v. City of Detroit,* 408 Mich. 663, 293 N.W.2d 278 (1980),[5] *see* App. B at 25a.

2. Appellees' suggestion that Ms. D'Alleva was granted a 20% rebate because the union waived its claim for agency fees prior to July 1, 1977, is simply an attempt to mislead the Court. Throughout this litigation, the focus has always been on the requirement imposed by MERC that Ms. D'Alleva pay the union 93.4% of the agency fee for the prior period covered by the union's demand and for the future.

The fact that the union chose to waive its claim for earlier fees is irrelevant. However, it is noted that while Ms. D'Alleva objected to paying these fees on contractual grounds, she did place 100% of the dis-

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[5] As noted in the Jurisdictional Statement at n.18, objecting agency fee payors are the *only* unfair labor practice litigants in Michigan who must submit their disputes to a third party before MERC will consider them. See, generally, discussion at 22-25.

puted agency fees into escrow for the period starting January 1, 1977, the beginning of the month following the end of the 90-day agency shop "grace period". App. B at 20a (Stipulation ¶ 18).

3. The *Hudson* decision obviously provides an adequate rebuttal to the union's argument on the exhaustion question.[6] Further support for appellant's position is found in *Smith v. United Trans. Union,* 39 Fed. R. Serv. 2d (Callaghan) 156, 158 (S.D. Cal. 1984) (nonmembers cannot be required to exhaust intra-union remedies); *accord Soto Segarra v. Sea-Land Service, Inc.,* 581 F.2d 291, 295 (1st Cir. 1978).

4. The confused and misleading introduction to the union's argument on the escrow issue is premised on a misreading of *Ellis, supra,*[7] and as shown already, a purposeful distortion of the facts of this case. It is also noted again that while the MERC decision did require the union to reduce its agency fee demand by 6.6%, this reduction was not considered relevant by the Court of Appeals to either the escrow or exhaustion issue. Jurisdictional Statement at 15.

5. The union's reliance on this Court's discussion of possible remedies in *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977), is clearly misplaced as noted in *Ellis,* 104 S. Ct. at 1890. The union's suggestion that

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[6] The Union's reliance in their Motion to Dismiss at 9 n.8 on the statement in *Hudson* regarding the amount of the union's unilateral fee reduction is irrelevant to the issue of exhaustion of intra-union remedies and, of course, completely contrary to the Seventh Circuit's decision on that issue.

[7] As noted by the union, even the majority decision of the Third Circuit in *Robinson, supra,* recognized the constitutional basis for the Court's rebate ruling in *Ellis.*

this Court should refrain from granting the relief suggested by appellant because such a holding might have the effect of causing other states to have to change their laws has even less merit. If the laws in other states are unconstitutional, facially or as applied, they should be struck down or interpreted consistent with the requirements of the First and Fourteenth Amendments. Even the most cursory review of the Court's decisions in such areas as redistricting, criminal procedure, capital punishment, civil rights and abortion reveals that the Court has never refrained from invalidating state laws which violate individual constitutional rights.

6. The table which appears at 11-13 of the union's motion to dismiss claims to represent the current law in a number of jurisdictions. Three (3) glaring examples should be noted for the record.

> (a) Massachusetts—The state statute does not provide for retroactive rebates as claimed by the union, and *Therrien v. Labor Relations Comm.*, 390 Mass. 644, 459 N.E.2d 88 (1983), does not deal with this issue. Instead, the controlling decision in Massachusetts on both the escrow *and* exhaustion issues is *School Comm. v. Greenfield Educ. Ass'n*, 385 Mass. 70, 82-85, 431 N.E.2d 180, 188-189 (1982). As noted in Appellant's Jurisdictional Statement at 17, 21, the state supreme court rejected any presumption of validity for a fee reduction made by a union unilaterally, and agreed that dissenting nonmembers cannot be required to exhaust an intra-union rebate scheme.[8]

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[8] Because the courts of last resort in Massachusetts and Michigan have issued conflicting decisions on these federal constitutional questions, it would also be proper to review this appeal on writ of certiorari under Sup. Ct. R. 17.1(b), as alternatively requested

(b) New York—Under the state statute, unions must establish demand and return systems as a prerequisite to receiving any agency shop fees. However, in light of this Court's decision in *Ellis, supra,* the statute has just been reinterpreted by the New York Public Employment Relations Board ("PERB") to require that the entire amount of the fee be placed in an interest-bearing escrow account while the dispute is pending. *United University Professions, Inc. (Thomas C. Barry),* Case Nos. U-7449, 7482 (September 19, 1984). As noted in that decision, the New York PERB has also ruled in *Public Employees Federation (Raterman),* 15 N.Y. P.E.R.B. ¶3024 (1982), that a nonmember need not exhaust the internal union rebate procedure before challenging the union fee determination in court.

(c) Illinois—In *Hudson, supra,* the Seventh Circuit ruled that the state statute authorizing agency shop clauses in collective bargaining agreements with school boards was unconstitutional, as applied, under the First and Fourteenth Amendments. Furthermore, the Court's decision rests on separate "free speech" and "due process" considerations having different implications with respect to the scope of constitutional protection.

> The first implies that the public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining. The second implies that the procedure must make reasonably sure that those

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by appellant pursuant to 28 U.S.C. §§ 1275(3) and 2103. Naturally, Sup. Ct. R. 17.1(b) would also apply to the conflict which now exists between the decision of the Court of Appeals herein and that of the Seventh Circuit in *Hudson, supra.*

> employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological in nature.

117 L.R.R.M. at 2318 (emphasis in original).

Hudson correctly underscores the constitutional basis of the *Ellis* decision and delineates the multiple errors of the Michigan Court of Appeals in this case. Objecting nonmembers cannot be forced to exhaust an intra-union rebate scheme as a precondition to securing governmental protection of their constitutional rights; and escrow is required prior to the administrative or judicial determination of the constitutionally permissble fee. Where there has not been a judicial or administrative determination of the permissible fee amount and the union is unwilling to concede that it engages in any spending for purposes other than collective bargaining, the entire fee must temporarily be placed in escrow. Once there has been such a determination, the escrow account can be closed and an advance reduction of future fees based on that determination will adequately protect the constitutional rights of dissenting employees. Where, as here, the union concedes that it engages in some "rebatable" spending but a dispute exists over the remaining fee which has not yet been adjudicated by a court or administrative agency, advance reduction of the amount conceded *and* escrow of the remainder is the appropriate solution.

CONCLUSION

Appellees' motion to dismiss has no merit. This Court should grant the relief requested in the Jurisdictional Statement at 27.

Respectfully submitted,

MILTON L. CHAPPELL
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

DAVID E. KEMPNER
Keller, Thoma, Schwarze, Schwarze,
DuBay & Katz, P.C.
2900 Penobscot Building
Detroit, Michigan 48226
(313) 965-7610
Attorneys for Appellant

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